

Chapter Ind 90

MUNICIPAL CONTRACTS FOR CONSTRUCTION
OF PUBLIC WORKS

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Note: See explanatory footnotes at the end of this chapter.

Ind 90.01 Definitions. The following definitions shall apply in wage rate determinations made by the department pursuant to s. 66.293, Stats.:

(1) "Employer," as used in these rules and in s. 66.293 (3) (f), Stats., includes any contractor, subcontractor, agent or other person, doing or contracting to do all or a part of the work.

(2) "Area" means the county or other locality from which labor for any project would normally be secured.

(3) "Locality" means the geographical area from which the persons in the trades or occupations to be used in the performance and execution of the project will normally be secured for employment on such public works or other similar projects.

(4) "Trade or occupation" means one of the job classifications that identifies the specific work regularly done by laborers, workers and mechanics in the erection, construction, remodeling or repairing of any building or any other works projects, on a contract basis on projects that are similar to the contract work in the area. The duties, kinds of work, and other component elements envisioned by the department for job classifications of trades and occupations are those which prevail and are historically recognized in the construction industry for work on projects of a character similar to the contract work.

(5) "Employee working on the project" means laborers, workers and mechanics employed directly upon the site of the work.

(6) "Laborers, workers and mechanics" include preapprentices, helpers, trainees, learners and properly registered and indentured apprentices but exclude clerical, supervisory, and other personnel not performing manual labor.

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(7) "The prevailing wage rate" included in a wage determination for any given trade or occupation is the hourly basic rate plus the hourly contributions for the types of economic or fringe benefits for that trade or occupation.

(8) "Prevailing hourly basic pay rates" are the hourly wage rates on which overtime payments are computed, and represent regular straight-time hourly wage rates before deductions or withholdings.

(9) "Hourly contributions" are the hourly contributions, or equivalent, for economic or fringe benefits in addition to the hourly basic rates. Payments for food, lodging, mileage, riding time, waiting time, call-in pay, overtime and other similar items are excluded. The rate of contribution or cost which is ordinarily an hourly rate, and the number of hours of work on which it is payable, will be reflected in the wage determination as such. If the contributions or costs for certain economic or fringe benefits are expressed in a formula or method of payment other than an hourly rate, the department may, at its discretion, express in the wage determination the rate of contribution or cost used in the formula or method of payment. The equivalent converted per hour value of the contribution or cost expressed in a formula or method of payment other than an hourly rate will be included in the prevailing hourly wage rate. ¹

(a) *Contribution irrevocably made by an employer to a trustee or to a third person.* Contributions for economic or fringe benefits made to a trustee or to a third person irrevocably will be considered in ascertaining hourly contributions. The "third person" must be one who is not affiliated with the employer. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund, except those used for apprenticeship training, must be set up in such a way that in no event will the employer be able to recapture any of the required contributions paid in or in any way to divert the funds. ²

(b) *Fund, plan or program.* The contributions for economic and fringe benefits must be made pursuant to a bona fide fund, plan or program. ³

(c) *Unfunded plans.* 1. The reasonable anticipated costs to an employer pursuant to an enforceable written commitment to carry out a financially responsible plan or program, will be considered economic and fringe benefits. ⁴

2. No type of economic or fringe benefit is eligible for consideration as a so-called unfunded plan unless:

a. A copy has been supplied to the department;

b. It could be reasonably anticipated to provide benefits described in s. 103.49, Stats., and sub. (9);

c. It is a bona fide commitment; and

d. The plan or program providing the benefits has been communicated in writing to the laborers, workers and mechanics affected. ⁵

(10) "Wage determination" includes the original determination and subsequent determinations modifying or otherwise changing the provisions of the original determination. ⁶

(11) "Project of public works" includes building or work involving the erection, construction, remodeling or repairing, under contract with a Wisconsin municipality as defined in s. 66.293 (3) (b), Stats.

(12) "Building or work" includes construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work, excepting for the delivery of mineral aggregate such as sand, gravel or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle. ⁷

(13) "Highway, street, or bridge construction" includes curb, gutter and sidewalk projects, and excludes without limitation because of enumeration street lighting systems, sanitary sewer, storm water sewer and water service and main construction projects, unless an integral part of the highway, street or bridge construction.

(14) "Erection, construction, remodeling, or repairing" means all types of work done on a particular building or work at the site thereof in the construction or development of the project, including without limitation, erecting, construction, remodeling, repairing, altering, painting and decorating, the transporting of materials and supplies to or from the building or work done by the employes of the contractor, subcontractor, or agent thereof, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work, by persons employed by the contractor, subcontractor, or agent thereof.

(15) "Site of work" means the premises and vicinity upon which any building or work is to be performed under the contract. ⁸

(16) "Department" means the state of Wisconsin department of industry, labor and human relations.

(17) "Contractor," under s. 66.293 (3) (g) and (h), Stats., means a person, including a construction manager or consultant who has entered into a contract with a municipality for a project of public works.

(18) "Subcontractor" means any subcontractor of a contractor and subcontractor of a subcontractor, regardless of tier of subcontractor.

(19) "Prevailing hours of labor," included in a wage determination for any given trade or occupation, are the hours per day and per calendar week for which hourly basic rates of pay are paid.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. (intro.), (1), (4), (9) (a), (c) 1, (c) 2a, (10), (11), (12), (14), (15), r. and rec. (8) and (9) (intro.), cr. (16) to (18), Register, January, 1976, No. 241, eff. 2-1-76; am. (4) to (6), (9) (d), (10) to (13) and (15), Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.015 Collecting and compiling wage rate information. (1) For purposes of making wage determinations the department shall conduct a continuing program for the collection and compilation of wage rate information.

(2) The department shall encourage the voluntary submission of wage rate information by employers, employers' associations, labor organizations, public officials and other interested parties, which reflects the wage rates paid to laborers, workers and mechanics on various types of construction projects in the area, except as provided in sub. (6) (b). The information submitted should not only reflect the wage rates paid to a

particular classification in an area, but also the type or types of construction on which such rates are paid, and whether or not such rates were paid pursuant to a federal, state or local prevailing wage rate determination.

(3) Except as provided in sub. (6) (b), the following types of information may be considered by the department in making wage rate determinations:

(a) Properly completed form DILHR-ERD-5720. Forms are furnished at no charge by the department.

(b) Signed statements containing all of the information as provided on form DILHR-ERD-5720.

(c) Signed collective bargaining agreements. The department may request the parties to the agreement to submit statements verifying its scope, content and application.

(d) Wage rate information submitted to the department by the United States department of labor or any other federal agency.

(e) Any other information pertinent to the determination of prevailing wage rates.

(4) The department may initially obtain or supplement such information obtained on a voluntary basis by such means, including the holding of hearings, and from such sources as deemed to be necessary.

(5) In order to enable the department to more accurately determine the prevailing wage rates and hours of labor in an area, the information used to compile a determination shall explicitly exclude:

(a) Information from operative builders who build on their own account for resale or lease.

(b) Information from investment builders who build on their own account for rental.

(c) Force account construction (construction work performed by an employer, primarily engaged in a business other than construction, for its own account and use and by its own employees).

(d) Information on projects that were subject to a wage determination issued by the U.S. department of labor, this department, or any similar local ordinance or enactment.

(e) Information on projects on which no work has been performed during the current or any of the previous 12 months, except as provided in sub. (6) (b).

(f) Information on projects that, because of their cost or unusual construction characteristics, do not typically reflect the prevailing wage rates or hours of labor in an area.

(6) If there has not been a sufficient number of similar projects completed in the area during the current or any of the previous 12 months, the department may consider:

(a) Information on similar projects completed more than one year prior to the current month.

(b) Information on similar current projects located in surrounding counties.

(c) Information from employers located in the county where the proposed project is located and which reflects the current wage rates and hours of labor that would be paid to their employes for work on similar projects.

(d) Information on projects excluded under sub. (5) (d).

(7) All of the information made available to the department prior to issuing a determination shall be evaluated in accordance with the statutory definitions provided for the word or phrases "area", "prevailing wage rate" and "prevailing hours of labor" in s. 103.49 (2), Stats.

Note: "Contractors Report of Construction Wage Rates", form DILHR-ERD-5720, may be obtained at no charge from the Department of Industry, Labor and Human Relations, Equal Rights Division, P.O. Box 8928, Madison, WI 53708.

History: Cr. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.02 Apprentices. (1) Apprentices may work at less than the prevailing wage rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program administered by the U.S. department of labor, a state agency recognized by the U.S. department of labor, or under Wisconsin's apprenticeship law, ch. 106, Stats.

(2) Any employe who is not properly registered as an apprentice under sub. (1) shall be paid not less than the prevailing wage rate applicable to the work actually performed.

(3) Apprentices shall be paid a percentage of the applicable journeyman's hourly basic rate of pay specified in the wage determination issued for a project.

(4) The appropriate hourly basic rate percentage shall be obtained from each apprentice's indenture.

(5) Except as provided in this subsection, apprentices shall receive all fringe benefits specified for the appropriate journeyman classification in the wage determination issued for a project. If the department determines that a different practice prevails for the payment of such benefits, then the fringe benefits shall be paid in accordance with that determination.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.03 Wages. Wages paid for work done in any given trade or occupation shall be computed at a wage rate not less than the prevailing wage rate listed in the determination. The type of work done for the most similar trade or occupation, and not a previously assigned occupational title, shall determine the required minimum prevailing wage rate payable. The applicable rate for the type of work done shall be determined according to the prevailing local practices in the area.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.04 Meeting wage determination obligations. (1) An employer performing work subject to a department wage determination may dis-

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charge minimum wage obligations for the payment of straight time wages and economic and fringe benefits by paying in cash, making payments or incurring costs for bona fide economic or fringe benefits (a) identical to, or of the same type as the ones found prevailing by the department and included in the wage determination, or (b) not of the type found prevailing by the department, but filed with and regulated by either the United States secretary of labor under the Employee Retirement Income Security Act of 1974, or state of Wisconsin commissioner of insurance under ch. 211, Stats., or by a combination thereof. Before an employer can be given credit for any other unfunded economic or fringe benefit plan, the employer must supply a copy of the plan to the department and comply with all of the other provisions of s. Ind 90.01 (9) (c).⁹

(2) Unconventional plans must be approved by the department before credit will be given for costs under s. 66.293 (3), Stats.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76.

Ind 90.05 Overtime payments. All hours worked by a laborer, worker or mechanic in excess of the prevailing hours of labor per day or per calendar week, must be paid at a rate at least 1½ times the hourly basic rate of pay. Sums paid by an employer for fringe and economic benefits shall be excluded in the computation of the overtime premium. In no event can the rate upon which the overtime premium is calculated be less than the amount determined by the department as the hourly basic rate of pay (i.e., cash rate). Nor can the rate upon which the overtime premium is calculated be less than the straight time cash payment made to the laborer, worker or mechanic, or be less than the hourly basic rate of pay, if it is higher. Contributions by employees are not excluded from the rate upon which the overtime premium is computed; that is, an employee's overtime premium rate is computed on the taxable earnings before any deductions are made for the employee's contributions to economic and fringe benefits. The employer's contributions, costs or cash payments for economic and fringe benefits may be excluded in computing the overtime premium rate so long as the exclusions do not reduce the overtime premium rate below the hourly basic rate contained in the wage determination.⁹

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.06 Laborers, workers and mechanics subject to s. 66.293, Stats. Every laborer, worker or mechanic employed directly upon the site of the work by the employer shall be subject to s. 66.293, Stats., regardless of the contractual relationship alleged to exist.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.07 Payrolls and records. Every employer shall keep and, upon request of the department or the contracting municipality, promptly furnish copies of any or all payrolls and records relating to work done, hours worked, and wages paid to laborers, workers or mechanics, and shall allow the department to examine original records relating to any and all work as required by s. 66.293 (3) (e) and (i), Stats.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86.

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Ind 90.08 Procedure for requesting wage determination. (1) A municipality shall request the department to ascertain the prevailing wage rate, hours of labor and hourly basic pay rates for all trades or occupations required to complete any project of public works which meets or exceeds the dollar thresholds provided in s. Ind 90.155.

(2) The request shall be made on the form numbered DILHR-ERD-5719, which shall be provided at no charge by the department.

(3) The department may be notified about ensuing projects as far in advance as possible. However, the official request to the department to ascertain and determine the prevailing wage rate, hours of labor and hourly basic pay rates for all trades and occupations required in the work contemplated shall be made between 50 and 60 days before making a contract by direct negotiation or soliciting bids.

Note: "Application For A Prevailing Wage Rate Determination", for DILHR-ERD-5719, may be obtained at no charge from the Department of Industry, Labor and Human Relations, Equal Rights Division, P.O. Box 8928, Madison, WI 53708.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.09 Procedure for requesting exemption from applying to department for wage determinations. (1) The petition of any municipality for exemption from applying to the department for ascertainment and determination of prevailing wage rates, hours of labor and hourly basic pay rates pursuant to s. 66.293 (3) (d), Stats., should be sent to the department and shall include:

(a) A certified copy of the ordinance or other enactment setting forth the standards, policy, procedure and practice followed in ascertaining and determining prevailing wage rates, hours of labor and hourly basic pay rates in all trades and occupations required in the work contemplated.

(b) A current schedule of prevailing wage rates, hours of labor and hourly basic pay rates for all trades and occupations required for any project of public works, except highway, street or bridge construction, setting forth:

1. Trades and occupations required.

2. Prevailing wage rates, hourly basic pay rates, hourly contributions for economic or fringe benefits, and prevailing hours of labor per day and per week for such trades and occupations.

3. Types of projects of public works, by kind and size on which such rates and hours apply.

4. Types of such economic or fringe benefits.

5. Effective dates of such rates, contributions and hours.

(c) Frequency of, method of, and responsibility for updating the schedule of prevailing wage rates, hours of labor and hourly basic pay rates.

(d) Name, title, address and phone number of person to whom the exemption order is to be mailed.

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(2) Upon request of the department, the municipality shall also supplement its petition with information pertinent to determining the granting of an exemption.

(3) An exemption will be granted for a period no longer than 18 months. A new petition shall be filed with the department each time continuation of the exemption is desired beyond the termination date granting such exemption.

(4) Each exemption is subject to revocation for cause at any time, and also subject to observance of the applicable provisions of Wisconsin laws, rules and regulations of the department, and of the agreements included in the petition and application. The provisions of ch. Ind 90 and s. 66.293 (3) (a), (e), (f), (g), (h), (i), (j), (k) and (m), 103.49 (1) and (2), Stats., remain in effect and are not included within an exemption.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76.

Ind 90.10 Procedure for an administrative review. (1) Any interested person may request the department to review any or all of the wage rates determined for any or all of the trades or occupations included in a determination provided that:

- (a) The request shall be made in writing to the department.
- (b) The request shall be made within 30 days from the date the determination was issued.
- (c) The request shall be made prior to the date the bids are awarded or the contracts are negotiated.
- (d) The request shall include evidence which shows that the wage rates do not represent those which prevail in the area. This evidence shall include wage rate information for the contested trade or occupation on at least one similar project located in the city, village or township where the proposed project is located and on which some work has been performed during the current or any of the previous 12 months, except as provided in sub. (5).
- (e) The information used in an administrative review shall be limited to that provided in s. Ind 90.015.

(2) If 3 or more similar projects are submitted with the request, and all 3 projects are located in the city, village or township in which the proposed project is located, and if these 3 projects provide wage rate information for the major trades or occupations under review, the department shall compute the modal wage rate for each trade or occupation as set forth in sub. (6), below.

(3) If the wage rate information submitted with the request includes less than 3 similar projects located in the city, village or township where the proposed project is located, the department shall include information on similar projects located in the cities, villages or townships immediately contiguous to the location of the proposed project.

(4) If wage rate information on 3 or more similar projects is not found within the geographic area described in subs. (2) and (3) above, the department shall continue selecting and including projects from each sub-

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sequent tier of contiguous cities, villages or townships until 3 or more similar projects are located.

(5) If no similar projects were constructed in the city, village or township where the proposed project is located during the current or any of the previous 12 months, the department may accept information on similar projects completed prior to this period, or on similar projects completed during this period but located in any other locality within the county where the proposed project is located.

(6) (a) From the most current data available on the projects finally selected, the department shall prepare a tabulation showing each trade or occupation under review, the hourly basic rate of pay, the hourly contributions paid, the total number of workers employed at each different rate and the total number of hours worked at each different rate, if such figures are available.

(b) If the figures are available for the majority of workers in a given trade or occupation, the figures may be estimated for the remaining workers in such trade or occupation.

(c) If the hourly basic rate of pay plus the hourly contributions paid figure which has the largest number of hours represents a collectively bargained rate for any given trade or occupation, then the department shall accept the comparable current collectively bargained rate for such trade or occupation in the jurisdictional area wherein the project covered by the wage determination under review is located as the prevailing wage rate.

(d) If the hourly basic rate of pay plus the hourly contributions paid figure which has the largest number of hours represents a rate other than a collectively bargained rate for any given trade or occupation, the department shall accept such rate as the prevailing wage rate.

(e) If the number of hours is not available for a given trade or occupation, the department shall accept prevailing wage rates in the same manner as set forth in pars. (c) and (d) above, but on the basis of the largest number of workers employed rather than on the basis of the largest number of hours worked.

(f) If the wage rate information does not specify the actual hourly basic rate of pay and the hourly contributions paid for any given trade or occupation, but merely indicates a collectively bargained rate, the department may include the hours and employment included in such report for such trade or occupation at the current collectively bargained rate in effect in the jurisdictional area wherein the contemplated project is located.

(7) If a request for an administrative review is filed with the department and involves only the prevailing hours of labor, the department will follow the same procedures and use the same criteria to compute the modal hours as it did to compute the modal wage rate.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.11 Procedure for filing a wage determination with a municipality which did not request or incorporate a required wage determination into a contract. (1) When a municipality does not request the prevailing wage rate determination required under s. 66.293 (3), Stats., the department's

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vit shall state where these records shall be kept and the name, address and telephone number of the person who shall be responsible for keeping them. These payroll records shall be retained and made available for a period of at least 3 years following the completion of the project of public works and shall not be removed without prior notification to the municipality.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.14 Evidence of compliance by contractor. Upon completion of the project of public works and prior to final payment therefor, each contractor shall file with the municipality an affidavit stating:

(1) That the contractor has complied fully with the provisions and requirements of s. 66.293 (3), Stats., and ch. Ind 90; that the contractor has received evidence of compliance from each of the agents and subcontractors; and the names and addresses of all of the subcontractors and agents who worked on the project.

(2) That full and accurate records have been kept, which clearly indicate the name and trade or occupation of every laborer, worker or mechanic employed by the contractor in connection with work on the project. The records shall show the number of hours worked by each employe and the actual wages paid therefor; where these records shall be kept and the name, address and telephone number of the person who shall be responsible for keeping them. The records shall be retained and made available for a period of at least 3 years following the completion of the project of public works and shall not be removed without prior notification to the municipality.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. (2), Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.15 Adjusting minimum project cost of completion. Minimum threshold estimated project cost of completion figures for s. 66.293 (3) (c), Stats., for projects of public works where a single trade is involved and projects of public works where more than one trade is involved shall be adjusted as soon as possible after January 1, 1976 and every 2 years thereafter on the basis of changes in the U.S. department of commerce's composite cost index, or other similar index. ¹¹

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76.

Ind 90.155 Minimum project costs. Section 66.293 (3), Stats., does not apply to any public works project for which the estimated project cost of completion is below \$8,000 where a single trade is involved, and \$80,000, where more than one trade is involved on such project.

Note: The dollar amounts in this section were adjusted on January 1, 1985 when the estimated project cost of completion ceiling was changed from \$7,500 to \$8,000 where one trade was involved and from \$75,000 to \$80,000 where more than one trade is involved.

History: Cr. Register, November, 1976, No. 251, eff. 12-1-76; r. and recr. Register, January, 1980, No. 289, eff. 2-1-80; am. Register, May, 1982, No. 317, eff. 6-1-82; am. Register, December, 1984, No. 348, eff. 1-1-85.

Ind 90.16 Cost of inspection. Any person may request an inspection under s. 66.293 (3) (m), Stats. The request shall be made in writing, identifying the project, employer and trade or occupation involved and including a statement to the effect that the requestor is willing to pay for the complete cost of the inspection if the employer is found to be in com-

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pliance. The department shall maintain a record of the cost it incurs in making the inspection and this amount shall be charged to the requestor if the employer subjected to the inspection is found to be in compliance.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 90.17 Date of notification. The date of notification by mail shall be the date entered on the document unless established otherwise by proof.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76.

FOOTNOTES FOR CHAPTER IND 90

¹ Specific economic and fringe benefits. (Interpretation)

(a) The term "other economic benefit" as used in s. 103.49, Stats., is the so-called "open end" provision. This was included so that new fringe benefits may be recognized by the department as they become prevailing. A particular fringe benefit need not be recognized beyond a particular area in order for the department to find that it is prevailing in that area.

(b) To insure against considering and giving credit to any and all economic and fringe benefits some of which might be illusory or not genuine, the qualification required by the department is that such economic and fringe benefits must be bona fide. No difficulty is anticipated in determining whether a particular economic or fringe benefit is bona fide in the ordinary case where benefits are those common in the construction industry and which are established under a usual fund, plan or program. The following are typical conventional economic and fringe benefits: medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, vacation and holiday pay, defrayment of costs of apprenticeship or other similar programs, or other bona fide economic and fringe benefits, but only where the employer is not required by other federal, state, or local law to provide any of such benefits. Employers may take credit for contributions made under such conventional plans without requesting the approval of the department.

(c) Economic and fringe benefits which an employer is obligated to provide under other federal, state, or local law are excluded. No credit may be taken under s. 66.293, Stats., for the payments made for such benefits. For example, payments for worker's compensation insurance under either a compulsory or elective state statute are not payments for economic or fringe benefits under s. 66.293, Stats. The omission in s. 103.49, Stats., of any expressed reference to these payments, which are common in the construction industry, suggests that these payments should not normally be regarded as bona fide economic and fringe benefits under s. 103.49, Stats.

² Although contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which were paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of making payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employes in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employe contributions, will be borne by the employer. In such case the return by the insurance company to the employer of sums paid in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be deemed a recapture or diversion by the employer of contribution made pursuant to the plan.

³ The phrase "fund, plan or program" is intended merely to recognize the various types of arrangements commonly used to provide economic and fringe benefits through employer contributions. In interpreting this phrase, the department will be guided by the experience of the United States department of labor and United States treasury department in administering the Employee Retirement Income Security Act of 1974, of the U.S. department of labor in administering other related programs, and of the Wisconsin state insurance commissioner in administering employe welfare funds under ch. 211, Stats.

⁴ These provisions are intended to permit the consideration of economic and fringe benefits meeting the requirements and which are provided from the general assets of an employer.

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⁵ As in the case of other economic and fringe benefits payable under s. 66.293, Stats., an unfunded plan or program must be "bona fide" and not a mere simulation or sham for avoiding compliance with s. 66.293, Stats.

⁶ (a) Types of wage determinations:

1. When economic and fringe benefits are prevailing for various classes of laborers, workers and mechanics in the area, such benefits are includable in any department determination. Illustrations contained in footnote 9, s. Ind 90.04 and 90.05, set forth some of the different types of wage determinations which may be made in such cases.

2. When economic and fringe benefits for various classes of laborers, workers and mechanics do not prevail in the area, the wage determination shall contain only the hourly basic rates of pay, that is, only the cash wages which are prevailing for the various classes of laborers, workers and mechanics. An illustration of this situation is contained in footnote 9, s. Ind 90.04.

(b) Subsequent determinations:

1. Except as provided in sub. (b) 3., subsequent determinations by the department which modify or otherwise change the provisions of the original determination shall be made within 30 days after the department issued the determination.

2. If the contracts are not awarded or negotiated or if the project is rebid or renegotiated more than 180 days after the date of the original determination, then the municipality shall request a new determination prior to soliciting bids or entering into a contract through direct negotiation.

3. Requests for prevailing wage rates for trades or occupations which are required in the work contemplated, but which are not included in the original determination, may be requested before or after the contracts are awarded or negotiated.

⁷ The terms include without limitation, buildings, structures, and improvements of all types such as sanitary sewer or sewerage works, garbage incinerators, swimming pools, tennis courts, parks, playgrounds, golf links, bathing beaches, bathhouses, city halls, courthouses, jails, schools, hospitals, homes for the aged or indigent, dams, plants, parkways, subways, tunnels, sewers, mains, power lines, pumping stations, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing and landscaping. The manufacture or furnishing of materials, articles, supplies or equipment whether or not a municipal agency acquires title to such materials, articles, supplies or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished is not a "building" or "work" within the meaning of these rules and regulations unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence. Section 66.293, Stats., does not apply to wage rates and hours of employment of laborers, workers or mechanics engaged in the processing or manufacture of materials or products or to the delivery thereof by or for commercial establishments which have a fixed place of business from which they regularly supply such processed or manufactured materials or products; except that this section does apply to laborers, workers or mechanics who deliver mineral aggregate such as sand, gravel or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle. Ready-mix concrete is not a mineral aggregate under the provisions of s. 66.293, Stats. Labor employed by a producer or commercial establishment which, although having a fixed place of business of the kind in some location, operates in a location specifically established in order to supply a particular job within the purview of s. 66.293, Stats., or in a location used only sporadically when a project happens to be close at hand, comes under the provisions of s. 66.293, Stats. Incidental or casual sale of material from such plants to others does not classify the same as a fixed commercial establishment.

⁸ The term "site of the work" normally contemplates a larger area than that which the completed building or work will actually occupy and will vary in size with the nature of the work required to be done on the project. Obviously, on some projects all of the work may be performed within a few feet from where the installation or work is or will be located, while on others requiring elaborate facilities such as a dam, or flood control project, the area may be quite extensive. In order to apply the phrase "site of work" in a sound and realistic manner, it is important to examine both the geographical and functional aspects of the work in question with some care.

⁹ Illustration of a wage determination:

| Hourly Basic Rate of Pay | Hourly Contributions are for all Hours Worked. Unless Footnoted Otherwise: | | | | Prevailing Hourly Wage Rate (Minimum) | Trade or Occupation | Prevailing Hours of Labor Per Calendar: | |
|--------------------------|--|-------------------|------------------|--------------------------|---------------------------------------|--------------------------|---|------|
| | Health & Welfare Benefits | Vacation Benefits | Pension Benefits | Other Specified Benefits | | | Day | Week |
| \$2.50 | s | s | s | s | \$2.50 | General Laborer | 8 | 40 |
| 2.65 | a | b | c | d | 3.156 | Truck Driver | 7 | 35 |
| 4.30 | e | | f | | 4.39 | 2-Axle Truck Electrician | 8 | 40 |
| 4.00 | 0.15** | | | | 4.15# | Carpenter | 8 | 40 |
| 3.15h | 0.15* | 0.20 | 0.10* | | 3.60# | Painter, brush | 7 | 35 |
| 4.00 | 0.15 | | 0.20 | 0.05g | 4.40 | Plumber | 8 | 40 |
| 3.90i | 0.10 | 0.10 | | | 4.10 | Iron Worker, All Types | 8 | 40 |

*All straight time hours worked.

**For hours worked in excess of straight time hours, contributions are increased in the same proportion as the overtime rate.

#See hourly contribution footnotes for change in this figure after certain specified hours.

a \$6.80 per week for welfare; \$0.194 M.H.E.

b 1 week vacation for one year of employment; amount of vacation is prorated for less than one year of employment; \$0.061 M.H.E.

c \$7.00 per week for pension; \$0.20 M.H.E.

d 6 paid holidays; \$0.061 M.H.E.

e \$22.64 Blue Cross for family coverage and \$8.18 Blue Cross for individual coverage per month; \$0.047 M.H.E.

f 1% of gross payroll for pension; \$0.043 M.H.E.

g Apprenticeship program

h Includes 10% vacation payment

i Includes 5% vacation and 5% holiday payments

Note: Footnotes h and i are intended to indicate clearly that the employe contributions must be considered as a part of the basic rate for overtime purposes.

M.H.E. = Minimum Hourly Equivalent based on the prevailing hours of labor as determined by the department.

(It should be noted that this format is not necessarily in the exact form in which determinations will be issued; it is for illustration only).

Based on the above illustration and assumptions, examples of ways of meeting wage determination obligations are shown below:

A. Straight time cash and fringe payment examples:

Example 1: An employer may discharge obligations for the payment of the \$3.15 hourly basic rate of pay and the \$0.15, \$0.20 and \$0.10 hourly fringe benefit contributions in the above illustration for "Brush Painter" in the following ways: (1) By paying not less than the basic hourly rate and by making the contributions for the fringe benefits as specified. For example, the obligations will be met by the payment of a straight time hourly rate of not less than \$3.15 and by contributing not less than at the rate of 15 cents an hour for health and welfare benefits, 10 cents an hour for pensions, and 20 cents an hour for vacation; or (2) By paying not less than the basic hourly rate and by making contributions for "bona fide" fringe benefits in a total amount not less than the total of the fringe benefits required. For example, the obligations will be met by the payment of a straight time hourly rate of not less than \$3.15 and by contributions of not less than a total of 45 cents an hour for "bona fide" fringe benefits; or (3) By paying in cash directly for the basic hourly rate and by making an additional cash payment in lieu of the required benefits. For example, where an employer does not make payments or incur costs for fringe benefits, obligations would be met by paying directly a straight time hourly rate of not less than \$3.60 (\$3.15 basic hourly rate plus 45 cents for fringe benefits); or (4) The employer may discharge minimum wage obligations for the payment of straight time wages and fringe benefits by a combination of the methods illustrated in subparagraphs (1) thru (3) of this paragraph. Thus, for example, obligations may be met by an hourly rate, partly in cash and partly in payments or costs for fringe benefits which total not less than \$3.60 (\$3.15 basic hourly rate plus 45 cents for fringe benefits). The payments in such case may be \$3.35 in cash and 25 cents in payments or costs in fringe benefits. Or, they may be \$3.00 in cash or 60 cents in payments or costs for fringe benefits.

Example 2: An employer may satisfy the obligations for the payment of the \$3.90 hourly basic rate of pay and the \$0.10 per hour payment for health and welfare benefits and the \$0.10 per hour payment for vacation benefits in the above illustration for "Iron Worker" in the following ways:

(1) By paying not less than \$3.90 per hour in cash, plus making payments to established health and welfare and vacation programs in amounts which total not less than \$0.20 per hour for either health and welfare or for vacations, or both; or (2) If the payments made to health and welfare or vacation programs, or to both programs, is greater than the combined total of \$0.20 per hour, the excess may be applied toward the \$3.90 basic hourly wage rate, i.e., by paying a cash hourly wage rate of \$3.80, plus \$0.30 per hour in fringe benefits of the type, or types, predetermined. (Note, however, that overtime premium would be computed on the \$3.90 basic hourly wage rate contained in the wage decision.); or (3) By paying not less than \$3.90 per hour in cash, plus paying an additional \$0.20 per hour in cash for fringe benefits. (In other words, the ironworker would receive a straight-time cash rate of \$4.10 per hour.); or (4) By paying not less than \$3.90 per hour in cash, plus an additional cash payment of \$0.10 per hour to the ironworker, plus a contribution of \$0.10 per hour to either health and welfare or vacation programs. (In this example, the employer is combining the methods discussed above. This method could be used in those cases where the employer provides some, but not all, of the fringe benefits set forth in the wage determination).

Example 3: The minimum hourly wage received by the employe should never be less than the total of the predetermined hourly basic rate of pay shown on the wage decision, plus the sum of the fringe benefit payments set forth in the wage decision. It is possible, however, to pay less than the minimum hourly wage rate in cash to the employe in those cases where the employer provides fringe benefits in excess of those required by the wage decision. For example, if the employe is an "Iron Worker" and is entitled to \$3.90 per hour as a predetermined hourly wage rate, plus \$0.20 per hour in fringe benefit contributions, but the employer actually pays \$0.30 per hour in fringe benefit contributions, (pursuant to a bargaining agreement or other contract of employment), the employer may satisfy obligations under the minimum wage requirements if \$3.80 per hour in cash is paid to the employe, and, in addition, fringe benefit contributions are made in an amount not less than \$0.30 per hour. (The wage rate upon which overtime premium would be based, would continue to be at least the basic hourly wage rate of \$3.90.)

B. Overtime premium and fringe benefit payment examples:

In no event may the rate upon which overtime compensation is computed be less than the predetermined hourly basic rate of pay shown on the applicable wage decision. In those cases where an employe receives cash wages at a rate less than the predetermined rate, such employe is still entitled to receive overtime compensation based upon not less than the predetermined hourly wage rate.

Contributions made by an employe to fringe benefit programs are not excluded from the regular or basic rate upon which overtime compensation is based.

Contributions made by an employer to fringe benefit programs, or paid in cash to the employe in lieu of fringe benefit payments, are excluded from the regular or straight time or basic rate upon which overtime compensation is based, except where such exclusion would reduce the rate upon which overtime is based to an amount less than the predetermined hourly basic rate of pay.

Unless the wage determination specifies otherwise, the prevailing practice is to pay fringe benefits for any hours worked over the prevailing hours of labor per day or per calendar week shown in the determination.

Overtime compensation must be computed by use of the method most advantageous to the employe.

Example 1: Overtime premium is never paid on fringe benefits, i.e., the "Brush Painter" in the illustration above with a basic hourly wage rate of \$3.15, plus \$0.45 per hour in fringe benefit contributions, is never paid overtime premium based upon a rate of \$3.60 per hour. However, the illustration shows that it is general practice to include an hourly vacation benefit payment for every hour worked in excess of 7 in a day or 35 in a week. The illustration shows that it is also the area practice not to pay health and welfare and pension benefits on overtime hours.

Example 2: While overtime compensation may not be computed on a rate less than the basic hourly wage rate, it may be computed on a rate in excess of the basic hourly wage rate. If an employer normally pays a "General Laborer" at a rate of \$3.00 per hour as a straight-time cash wage, not including fringe benefit payments, while the applicable wage decision as shown in the above illustration requires a wage rate of only \$2.50 per hour, the "General Laborer" is entitled to receive overtime wages based on the agreed upon regular hourly wage rate of \$3.00. In this example, the overtime wage rate must be not less than \$4.50 per hour.

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Example 3: A "Plumber" is paid a basic hourly wage rate of \$4.00 per hour, plus \$0.40 in fringe benefits. The employer makes the fringe benefit payments directly to established programs for all hours worked. The "Plumber" is entitled to an overtime premium rate of one and one-half times the basic hourly rate, not including fringe benefit payments. Therefore, in the illustration, the proper overtime wage rate would be \$6.40 (\$4.00 per hour as the basic hourly wage rate plus \$2.00 per hour as the overtime premium plus \$0.40 in fringe benefits).

Example 4: Under a similar situation, the employer pays \$0.20 to the "Plumber" in cash payments in lieu of fringe benefits and \$0.20 to an established fringe benefit program, making a total fringe benefit payment of \$0.40 per hour as required by the illustration. Although the "Plumber" receives \$4.20 per hour in cash for all straight-time hours worked, the plumber is still entitled to only \$6.40 per hour as an overtime wage rate (\$4.00 per hour as the basic hourly wage rate plus \$2.00 per hour as the overtime premium plus \$0.40 for fringe benefits).

Example 5: A "Plumber" is paid a regular wage rate of \$4.40 per hour plus \$0.40 in fringe benefit payments, under a wage determination which requires a minimum hourly wage rate of \$4.00 per hour plus \$0.40 in fringe benefit payments as shown in the illustration above. Since overtime must be computed on the hourly wage rate actually paid, when such rate exceeds the predetermined rate, the "Plumber" is entitled to an overtime wage rate of \$7.00 per hour (\$4.40 per hour as the regular hourly wage rate plus \$2.20 per hour as the overtime premium plus \$0.40 in fringe benefits).

Example 6: A "Plumber" is paid \$3.80 per hour in cash plus \$0.60 in fringe benefit payments. The employer, in addition to paying the required \$0.40 in fringes, for all hours worked, also pays \$0.20 per hour to a bona fide fringe benefit program for all hours worked which was not found by the department to be prevailing in the area. Since, when computing the wage rate upon which overtime premium is based, such rate may never be less than the hourly basic rate of pay shown in the applicable wage determination, the "Plumber" is entitled to an overtime wage rate of \$6.40 (\$4.00 as the minimum hourly wage rate shown on the wage decision, plus \$2.00 per hour as the overtime premium plus \$0.40 in fringe benefits). The employee would receive a cash overtime wage rate of at least \$5.80 per hour.

Example 7: A "Carpenter" who is paid a predetermined minimum hourly wage rate of \$4.00 plus \$0.15 in fringe benefit payments for straight time hours and \$0.225 for hours in excess of straight time hours as shown in the illustration above, is entitled to receive an hourly overtime wage rate of \$6.225 per hour (\$4.00 as the hourly basic rate of pay plus \$2.00 as the overtime premium, plus \$0.225 per hour for fringe benefit payments).

Example 8: Under a wage decision which establishes a wage rate for "Carpenters" as shown in the illustration above at \$4.00 per hour plus \$0.15 in fringe benefit payments for straight time hours and contributions in the same proportions as the straight time rate is to the overtime rate for hours worked in excess of straight time hours, an employer pays \$3.80 per hour plus \$0.60 in fringes for all hours worked. The "Carpenter" is entitled to an overtime wage rate of \$6.225 (\$4.00 as the hourly basic rate of pay shown in the wage decision, plus \$2.00 per hour as the overtime premium, plus \$0.225 per hour for fringe benefit payments, as required by the wage decision). The employer may then deduct the \$0.60 paid to the fringe benefit program from this \$6.225 figure with the result that the employee would receive a cash overtime wage rate of at least \$5.625 per hour.

Example 9: An employer may pay a cash equivalent of any fringe benefit found prevailing by the department. Such a cash equivalent would also be excludable in computing the regular or basic rate. For example, the W construction contractor pays the "Two Axle Truck Drivers" \$3.166 in cash under a wage determination as shown in the illustration above which requires a basic hourly rate of \$2.65 and a fringe benefit contribution equivalent of 60.6 cents. The contractor pays the 60.6 cents in cash because no payments were made and no costs incurred for fringe benefits. The overtime premium in this case would be computed on a regular or basic rate of \$2.65 an hour. However, in some cases a question of fact may be presented in ascertaining whether or not a cash payment made to laborers or mechanics is actually in lieu of a fringe benefit or is simply part of their straight time cash wage. In the latter situation, the cash payment is not excludable in computing overtime premium. Consider the examples set forth below:

(1) The X construction contractor has for some time been paying \$2.90 an hour to a "Two Axle Truck Driver" as the basic cash wage plus 60.6 cents an hour as a contribution to a welfare and pension plan. The department determines that a basic hourly rate of \$2.65 an hour and a fringe benefit contribution equivalent of 60.6 cents for the plans shown in the above illustration are prevailing. The basic hourly rate or regular rate for overtime purposes would be \$2.90, the rate actually paid as a basic cash wage for the "Two Axle Truck Driver" employee of X, rather than the \$2.65 rate determined as prevailing by the department.

(2) Under the same prevailing wage determination discussed above in this paragraph, the Y construction contractor who has been paying \$2.65 an hour as the basic cash wage on which overtime compensation has been computed, reduces the cash wage to \$2.40 an hour but com-

puts the cost of benefits as \$1.00 an hour. In this example the regular or basic hourly rate would continue to be \$2.65 an hour for computing overtime premium.

Example 10: A "Brush Painter" works the following hours during the workweek on covered work under the illustrated wage determination above:

| S | M | T | W | T | F | S | Total |
|----|----|---|---|---|---|---|-------|
| 10 | 10 | 8 | 8 | 6 | 0 | 0 | 42 |

The employe has worked 8 hours over 7 in a day (Sunday, Monday, Tuesday and Wednesday), and has worked 7 hours over 35 in a workweek, therefore, the employe is entitled to 8 hours overtime wages. Since the daily number of overtime hours is greater than the weekly number of overtime hours, the employe is entitled to 8 hours of overtime.

Example 11: A "General Laborer" (in the illustration above) works the following hours on covered work during a workweek:

| S | M | T | W | T | F | S | Total |
|----|----|---|---|---|----|---|-------|
| 10 | 10 | 8 | 8 | 6 | 10 | 0 | 52 |

The employe has worked 6 hours over 8 in a day (Sunday, Monday, and Friday), and has worked 12 hours over 40 in a workweek, therefore, the employe is entitled to 12 hours overtime wages. The weekly number of overtime hours is the greatest.

Example 12: A "General Laborer" works the following hours on covered work in the illustration above during a workweek:

| M | T | W | T | F | S | S | Total |
|---|---|---|---|---|---|---|-------|
| 9 | 9 | 9 | 9 | 9 | 2 | 0 | 47 |

The employe has worked 5 hours over 8 in a day Monday through Friday, and has worked 7 hours over 40 in a workweek, therefore, the employe is entitled to receive 7 hours overtime compensation computed on a weekly basis.

¹⁰ For s. Ind 90.13, completion of the entire project means the last day on which physical work was performed on the project.

¹¹ The United States department of commerce's composite cost index is computed by the bureau of the census. It is the ratio of the estimate of total new construction put in place in current dollars (seasonally adjusted) to the corresponding estimate in 1967 dollars. This index measures the combined result of cost changes as well as monthly changes in the weights of different types of construction in the current dollar construction activity aggregate.